IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JULISSA APONTE RIVERA, **Plaintiff,** **v.** **DHL SOLUTIONS (USA), et al.,** **Defendants.**	**Civil No. 07-1950 (GAG)**

OPINION AND ORDER

Plaintiff Julissa Aponte Rivera brought this action against her former employer DHL Solutions, Inc., Insurance Company ABC, John Doe, and Company XYZ pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and Local Laws 17, 29, and 100, P.R. Laws Ann., tit. 29, §§155 et seq., 1321a et seq., 146 et seq., respectively, claiming gender-based discrimination and hostile work environment (Docket No. 2). Defendants moved for summary judgment (Docket No. 23) pursuant to Fed.R.Civ.P. 56. In their motion for summary judgment they argue: (a) that plaintiff has failed to establish a *prima facie* claim of discrimination inasmuch as she was never subject to any adverse employment action and her failure-to-promote claim is time-barred; (b) that plaintiff cannot establish that she was subjected to a hostile work environment because the complained-of conduct was not sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment; (c) that there is no basis for employer liability; and (d) that given that there are no federal claims upon which relief may be granted, the supplemental state law claims should also be dismissed. After reviewing the pleadings, the court **GRANTS IN PART** and **DENIES IN PART** defendants' motion for summary judgment (Docket No. 23).

I. Relevant Factual Background

Plaintiff Julissa Aponte Rivera ("Aponte") started working for defendant DHL Solutions, Inc. on March 6, 2000 as a Service Center Assistant at the spare parts center in San Juan. On July 7, 2001, plaintiff was promoted to the position of Material Handling Supervisor, although she states

that the promotion was to Logistics Manager for Puerto Rico and the Caribbean. Plaintiff claims to have had an excellent relationship with all of her supervisors. Enrique Frías ("Mr. Frías") became Aponte's supervisor in June 2004, the time when the claimed-of sexual harassment began. Plaintiff's first complaint to Human Resources, in June 2004, was that her supervisor was creating an "uncomfortable" working environment by making several comments to her that were out of place because they had sexual connotations. Plaintiff also informed DHL that the workload assigned to her was impossible to accomplish. To this Mr. Frías answered "women is [sic] always complaining about everything." (Docket No. 23-6 at 12). A position for Program Manager became available in October 2004. Aponte expressed interest in the position and alleges to have had the necessary experience to have qualified for the same. Nevertheless, at the November interview with Mr. Frías, plaintiff felt rushed and as though the interview was only *pro forma* because of insinuations that Rafael Camacho ("Mr. Camacho") would be hired as Program Manager. After this incident, plaintiff took a ten-month leave of absence from January to November 2005. Upon her return, she found her computer and office occupied by Mr. Camacho and felt that the harassment immediately worsened. Plaintiff felt humiliated and that her authority and position was diminished in front of those she was supervising. Aponte participated in daily conference calls with clients and Mr. Camacho and she felt that she was constantly harassed during these conference calls (Docket No. 23-6 at 41). In March 2006 she complained to DHL for the second time of the hostile work environment caused by Mr. Frías and Mr. Camacho and plaintiff took another leave of absence because the working environment became intolerable. In June 2006, plaintiff resigned from her employment and filed a Charge of Discrimination before the Equal Employment Opportunity Commission ("EEOC") (Docket 2 at 3).

II. Standard of Review

Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "An issue is

genuine if 'it may reasonably be resolved in favor of either party' at trial, and material if it 'possess[es] the capacity to sway the outcome of the litigation under the applicable law.'" Iverson v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006) (citations omitted).

The moving party bears the initial burden of demonstrating the lack of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. The non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the court finds that some genuine factual issue remains, the resolution of which could affect the outcome of the case, then the court must deny summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party (here, the plaintiff) and give that party the benefit of any and all reasonable inferences. Id. at 255. Moreover, at the summary judgment stage, the court does not make credibility determinations or weigh the evidence. Id.

III. Analysis

A. Failure-to-Promote Claim

In a sex discrimination claim under Title VII of the Civil Rights Act of 1964 the plaintiff bears the burden of proving her *prima facie* case through a four-prong test. Texas Dept. of Community Affairs v Burdine,450 U.S. 248, 253 (1981) (citing McDonnell Douglas v. Green, 411 U.S. 792(1973)). If the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant so as to demonstrate a non-discriminatory reason for the employee's rejection or denial. Id. "The *prima facie* case serves an important function in the litigation: it eliminates the most common non-discriminatory reasons for the plaintiff's rejection." Id. at 254.

The Supreme Court has held that for a plaintiff to establish a presumption of gender discrimination, she must show that (1) she is a member of a protected class; (2) an adverse employment action was taken against her; (3) she was otherwise qualified; and (4) her position remained open or was filled by a person with qualifications similar to hers. García v Brystol-Myers Squibb Co., 535 F.3d 23, 31 (1st Cir. 2008). As a woman claiming gender-based discrimination, Plaintiff satisfies prong 1. The court will address prongs 2, 3, and 4 in its analysis.

Defendant argues that plaintiff failed to establish a *prima facie* case of gender discrimination because she did not suffer an adverse employment action and, in the alternative, the failure-to-promote claim is time-barred (Docket No. 24 at 7). Plaintiff contests in her Opposition to Defendant DHL's Summary Judgment (Docket No. 34 at 5) that the adverse employment action manifested itself in the form of a constructive discharge. "A constructive discharge usually occurs as a result of sexual harassment that took place in violation of Title VII." Johanna Zayas v. Frank Torres-Oquendo, et al, 2009 WL 1473506, *5 (D.P.R. 2009). Therefore, the court opines that the constructive discharge, as one that occurs "when the employer makes working conditions so intolerable that a reasonable employee would feel compelled to resign," Hunt v. Rapides Healthcare Systems, LLC, 277 F.3d 757, 771 (5th Cir. 2001), is not representative of the required adverse employment action for a sex discrimination case based on a failure to promote.

When a failure-to-promote claim constitutes the adverse employment action, the elements of the *prima facie* claim vary depending on the nature of the claim. Therefore, in order to prove her failure-to-promote claim, plaintiff must establish "(1) that she is a member or a protected class who (2) was qualified for an open position for which she applied, but (3) was rejected (4) in favor of someone possessing similar qualifications." Rathbun v Autozone, Inc., 361 F.3d 62, 71 (1st Cir. 2004). In light of the relevant facts of the case, the court finds that with regards to prongs 2 and 4, there are genuine issues of material fact because plaintiff offers evidence showing that she met the necessary qualifications for the job and that she had similar qualifications to the person hired (Dockets No. 34 at 8-10 and 23-5 at 25-26). On the other hand, defendant alleges that Aponte did not meet the professional standards to qualify (Docket No. 24 at 9-11). The court would, for this reason, deny summary judgment. However the court must first address defendant's argument with respect to the failure-to-promote claim being time-barred.

Plaintiff raises the continuing violation doctrine which allows the court to consider events that took place outside the statutory period "as long as the untimely incidents represent an ongoing unlawful employment practice." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 107

(2002). Nevertheless, a failure-to-promote is a discrete act and discrete acts have to fall within the statutory period in order for a plaintiff to recover for them. Id. The Supreme Court held in Morgan that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges." Id. at 113. Plaintiff filed a Charge of Discrimination against defendant before the EEOC on June 26, 2006, alleging discrimination and hostile work environment because of her gender. According to the Amended Complaint (Docket No. 2 at 4), the position for DHL Program Manager became available in October 2004. Plaintiff was interviewed on November 12, 2004 and was told by Mr. Frías that the position would be filled by the afternoon of that same day. The charges must be filed with the EEOC within **300 days** of the employment practice. Morgan, 536 U.S. at 107 (citing TitleVII of the Civil Rights Act of 1964, 42 U.S. C. s 2000e-5(e)(1)). It is evident to the court that the 300-day statutory period had elapsed by the time plaintiff filed a charge before the EEOC. Therefore, the court concurs with defendant's argument and finds that the failure-to-promote claim is time-barred. The court, therefore, **GRANTS** summary judgment as to the sex discrimination claim.

B. Hostile Work Environment Claim

In order to succeed in a hostile work environment claim, the plaintiff must establish: (1) that she is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that the sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis of employer liability has been established. O'Rourke v City of Providence, 235 F.3d 713, 728 (1st Cir. 2001). As a woman, plaintiff is a member of a protected class and satisfies prong 1. As for prongs 2 and 3, plaintiff has alleged and presented evidence that she was subjected to unwelcome harassment and that it was based on sex (Docket Nos.

23-6 at 10, 17, 25, 32, and 41-44). The court's analysis will, therefore, be limited to prongs 4, 5, and 6.

Title VII is violated when the work environment is charged with ridicule, insults, and discriminatory intimidation "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miguel v. Nesco Redondo, S.E., 394 F.Supp. 2d 416, 425 (D.P.R. 2005). Plaintiff states that she had excellent evaluations from her supervisors up until 2004, when Mr. Frías started supervising her (Docket No. 2-3 at 4). Plaintiff further claims that when Mr. Frías began working as supervisor the working environment turned hostile and uncomfortable due to unwelcome sexual harassment, such as telling her things like "When will you demonstrate that you have control of the operation? Is it that you don't have pants on tight?" (Docket No. 23-6 at 14), asking her if she was married and afterwards telling her that she was "expecting a man like [him]" (Docket No. 23-6 at 20), asking her to go to a party with him (Docket No. 23-6 at 22), and calling her "weak" or telling her she complained too much (Docket No. 23-6 at 28). Defendant argues that Mr. Frías could not have created a hostile work environment since he visited Puerto Rico five times in one year. Aponte narrates that Mr. Frías harassed her following six specific events and that his behavior extended from June to December of 2004 (Docket No. 23-4 at 2-29). Therefore, the six events occurred in a six-month time span, after which she took a ten-month leave of absence from January to November 2005 (Docket No. 23-6 at 4).

Further, upon plaintiff's return, she believed that the "pressure" would have subsided, nevertheless, it worsened due to Mr. Camacho's conduct. Aponte states that both him and Mr. Frías met with her and "in a loud tone said something like 'When are you going to leave?'" (Docket No. 23-6 at 40). Also, Mr. Camacho would constantly refer to her and women in general as "morons" and "stupid" (Docket No. 23-6 at 41). Mr. Camacho's abusive behavior mainly took place during the daily conference calls with clients, as stated under oath (Docket 23-6 at 41), and lead plaintiff to take a second leave of absence in March 2006, which later resulted in her resignation in June 2006. It is the court's duty to differentiate between minor criticism and frequent and severe

harassment through the use of "common sense and an appropriate sensitivity to social context." Redondo, S.E., 394 F.Supp. 2d at 425 (D.P.R. 2005) (citing Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 82 (1998)). Therefore, the court calls attention to the six- month and four-month time range in which the intimidation, insults, and abusive comments occurred. The court finds that although the isolated events may not seem as severe as the case law esteems, observing "the totality of the circumstances," Zambrana Santos v. Banco Santander de P.R., 363 F. Supp. 2d 56, 65 (D.P.R. 2005), would result in a genuine issue of fact as to whether they constitute severe and pervasive harassment. Also, a reasonable jury may conclude that this conduct was severely hostile for plaintiff, enough to lead to an extended leave of absence, and enough for a reasonable person to find the same behavior intimidating, insulting, and abusive. "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

The Supreme Court has repeatedly held that "simple teasing, off-hand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. . . [this in order to ensure that] Title VII does not become a general civility code." Smith v. Family Enrichment Center, Inc., 2009 WL 1457973, *5 (M.D. Fla. 2005) (citing Faragher v. City of Boca Raton, 118 S. Court 2275, 2283-284 (1998)) (citations omitted). And, although, some circuit courts find that it is the court's prerogative to determine if the sexual harassment constitutes severe and pervasive treatment sufficient enough to create a hostile work environment, the First Circuit applies the reasonable jury test, whereby it is the jury who decides whether the treatment was sufficiently severe or pervasive. Rivera-Rodriguez v. Frito Lay Snacks Caribbean, a Division of Pepsico, Inc., 265 F.3d 15, 25 (1st Cir. 2001). In this case, plaintiff has presented a forecast of evidence that could lead a reasonable jury to decide that she was subjected to a hostile work environment (See Docket No. 23-6 at 2-52). Therefore, the court finds that a

question of fact remains as to whether the treatment was sufficiently frequent, severe, and pervasive, and it should be left up to a jury to decide if defendant's conduct is actionable as a hostile work environment claim.

The court now turns to defendant's argument that plaintiff failed to prove employer liability. An employer's liability for a hostile work environment claim depends on the harasser's employment status relative to the victim's. DHL would be vicariously liable if plaintiff's supervisor created a hostile work environment, but if a co-worker created the hostile work environment, the employer would only be held liable if it was negligent either in discovering or remedying the harassment. See Zayas, 2009 WL 1473506 at *5 (D.P.R. 2009) (citing Torres-Negron v. Merck & Company, Inc.,488 F.3d 34, 40 (1st Cir. 2007)). In order for an employer to defeat vicarious liability for supervisor harassment, it must prove that it exercised "(1) reasonable care to prevent and correct promptly any sexually harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id. at 145-46. This defense is raised when the discharge does not involve official actions.

In this case, the evidence shows that in June of 2004 plaintiff complained to human resources with regards to Mr. Frías' conduct and that human resources stated that it "would address the issue" (Docket Nos.23-6 at 17 and 23-12 at 1). Then, plaintiff complained again in March 2006 of Mr.Camacho's behavior. Maude Cesari of Human Resources assured plaintiff that she would travel to Puerto Rico in order to deal with the problem (Docket No. 23-21 at 1). After such meeting, Aponte thanked Maude Cesari and told her that there had been positive change (Docket No.23-22 at 1). However, plaintiff resigned in June 2006. Defendant claims that "[it] addressed plaintiff's concerns [in good faith and] in a timely fashion and took immediate and proper action" (Docket No. 24 at 19). Defendant states that after the first complaint, Human Resources found that there was just a personality conflict between Mr. Frías and Aponte, and provided coaching for them both (Docket No. 24 at 19). Therefore, the court finds that there is a genuine issue of material fact as to whether DHL took reasonable, prompt, and correct action and if plaintiff reasonably failed to take advantage

of it so as to prevent the sexually harassing behavior. For the aforementioned reasons, the court **DENIES** defendant's motion for summary judgment as to the hostile work environment claim.

C. Supplemental State-Law Claims

Given that plaintiff's hostile work environment claim survived defendant's motion for summary judgment, and that the court understands that Law 17, Law 69, and Law 100 include hostile work environment as an actionable claim, the court **DENIES** defendant's motion for summary judgment as to the state law claims.

IV. Conclusion

For the abovementioned reasons, the court **GRANTS IN PART** and **DENIES IN PART** defendants' motion for summary judgment (Docket No. 23).

SO ORDERED.

In San Juan, Puerto Rico this 8th day of July 2009.

S/Gustavo A. Gelpí

GUSTAVO A. GELPI
United States District Judge